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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 85

O. G. HARP, DOING BUSINESS AS O. G. HARP POULTRY AND EGG COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court for the Western District of Oklahoma (R. 11–18) are reported in 80 F. Supp. 236. The opinion of the United States Court of Appeals for the Tenth Circuit (R. 71–77) is reported in 173 F. 2d 761.

JURISDICTION

The judgment of the Court of Appeals was entered March 28, 1949 (R. 77). Petitioner's petition for rehearing was denied by an order entered on April 26, 1949 (R. 79–80). The petition for certiorari was filed May 27, 1949. Petitioner apparently intended by reference to

"Section 240, of the Judicial Code, as amended by Act of February 13, 1925" (repealed by c. 646, sec. 39, 62 Stat. 992, effective September 1, 1948) to invoke the jurisdiction of this Court under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the provision in Section 5 of the Walsh-Healey Public Contracts Act that the Department of Labor's findings of fact as to breach or violation of a representation or stipulation required by the Act "if supported by the preponderance of the evidence, shall be conclusive in any court of the United States" is applicable to suits brought by the United States under Section 2 of the Act to recover liquidated damages provided in the Act for breach of such representations or stipulations.

2. Whether the Act, as interpreted by the courts below, deprives defendant of the right to trial by jury in violation of the Seventh Amendment to the Constitution.

3. Whether Section 6 (c) of the Portal-to-Portal Act of 1947, providing a grace period of one hundred and twenty days for instituting suit on a then accrued cause of action "unless at the time commenced it is barred by an applicable State statute of limitations," operates, in a suit by the United States, to invoke without benefit of the grace period a state statute of limitations in existence prior to the enactment of the Portal

Act but admittedly not theretofore applicable to the Government.

STATUTES INVOLVED

Provisions of the Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036; 41 U. S. C. 35–45) and of the Portal-to-Portal Act of 1947 (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C., Supp. I, 251–262) are involved here. The pertinent provisions are printed in the Appendix *infra*.

STATEMENT

After a full administrative hearing instituted and conducted in accordance with Sections 4 and 5 of the Walsh-Healey Public Contracts Act, and the Rules of Practice promulgated thereunder,[1] before a trial examiner of the United States Department of Labor, a report (R. 46–62) was filed by the trial examiner on November 21, 1946. In this report, the examiner found that petitioner was liable for liquidated damages under Section 2 of the Act in the sum of $13,030 by reason of petitioner's knowing employment of certain minors during the years 1943–1945 in the performance of Government contracts, contrary to the requirements of those contracts and in violation of the Act. Petitioner took exceptions to those findings, and on July 25, 1947 the Adminis-

[1] Codified June 29, 1945, in the Code of Federal Regulations, 41 CFR, 1945 Supp., sec. 203 *et seq.* (10 F. R. 8136, revised 11 F. R. 14493).

trator of the Wage and Hour and Public Contracts Divisions of the United States Department of Labor filed his decision (R. 62–69) upholding the trial examiner's finding that the Act and the contract stipulations had been violated, but concluding that the amount due as liquidated damages was only $6,970. Petitioner did not seek to have this decision reviewed by the Secretary of Labor, and under the Rules of Practice it became final.

Petitioner failed to pay the amount thus found to be due, and, in accordance with Section 2 of the Act, this action to enforce the Administrator's decision was filed in the district court on September 8, 1947 (R. 3). Petitioner moved to dismiss the complaint for failure to state a claim on which relief could be granted (R. 4). The motion was denied (R. 5). After answer was filed (R. 5–10), the Government moved for summary judgment, filing a certified copy of the administrative proceedings and the findings based thereon (R. 10–11). No demand for jury trial was made by petitioner. The district court reviewed in detail the evidence contained in the administrative proceedings on which the administrative findings were based, and concluded that the findings were supported by a preponderance of the evidence, that by reason of Section 5 of the Act those findings were therefore conclusive, and that such findings of fact were adequate to support the claim for summary judgment notwithstanding

petitioner's contention that the statute of limitations provided in Section 6 of the Portal-to-Portal Act of 1947 barred recovery. Accordingly, judgment was entered for the Government (R. 11–18).

The Court of Appeals affirmed (R. 71–77). The question of petitioner's right to a jury trial was then first raised in his petition for a rehearing, which was denied (R. 78–80).

ARGUMENT

1. The petition does not dispute the conclusion reached by both of the courts below that the preponderance of the evidence in the record of the administrative proceedings supports the findings of fact made by the Administrator (R. 18, 77). It contends, rather, that the statutory provision that such findings "if supported by the preponderance of the evidence, shall be conclusive in any court of the United States" (Section 5) is restricted to ancillary administrative proceedings and other types of suits and is inapplicable to an action to recover liquidated damages under Section 2 (Pet. 14). But no such restriction appears in the statute's terms, and the whole structure of the Act forbids such a limited application of the provisions of Section 5.

As pointed out in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 507, the determination of the issue of violation of the Public Contracts Act is "primarily the duty of the Secretary." Sec-

tion 4 of the Act authorizes and directs the Secretary of Labor "to administer the provisions of this Act", "to prescribe rules and regulations with respect thereto", and "to make investigations and findings" as may be necessary to carry out these functions. Section 5 provides for the holding of administrative hearings "on complaint of a breach or violation of any representation or stipulation." It directs the Secretary to "make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States" and authorizes the Secretary "to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act." Plainly, these provisions contemplate and authorize a prior administrative determination before court enforcement, and envisage all judicial proceedings as integrated with and supplementary to the Secretary's primary power and duty to administer and enforce the Act.

Since the only provisions for judicial enforcement of the terms of the statute are contained in Section 2, it seems evident that the requirement in Section 5 that the Secretary's finding "shall be conclusive in any court" (if supported by a

preponderance of the evidence) must relate, if it is to have the substantial scope clearly prescribed by the Act, to the court actions contemplated by Section 2. Petitioner's contrary contention is predicated on the erroneous assumption that an action under Section 2 is simply one for the breach of a contract unrelated to the statutory requirements and purposes (Pet. 13). But, obviously, Section 2 does not stand alone, and the statute cannot be considered in segments, but must be read as a whole. Section 2, containing the statutory provisions for enforcement in the courts, is correlated with the rest of the Act and infused with the same aims and purposes.[2]

2. The argument that to give effect to the statutory provision as it is written violates petitioner's constitutional right to a jury trial apparently overlooks the fact that the Seventh Amendment's provision is expressly restricted to "suits at common law." The Government's right of action for liquidated damages for employment of minors is plainly a special right of action created by statute and not a suit at common law. The decisions of this Court in *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 48, and *Block* v. *Hirsh,*

[2] It has been the consistent administrative practice of the Department of Labor to make an administrative determination before suit is brought under Section 2. See fn. 4, *infra*, p. 9.

256 U. S. 135, 158, therefore are controlling here.[3]

3. Petitioner's last contention is that Section 6 (c) of the Portal-to-Portal Act of 1947 bars the relief here sought by invoking without benefit of the grace period a state statute of limitations in existence prior to the enactment of the Portal Act but not theretofore applicable to the Government. While the questions whether Section 6 applies at all to suits by the United States, and, if so, whether the period of limitations runs from the date of the prohibited employment rather than the date of the final administrative determination, are important, we believe the Court of Appeals was correct in holding that determination of these questions is unnecessary to decision of this case. If, however, this Court considers these questions appropriately presented for decision in this case, they are of sufficient importance to warrant consideration by this Court.[4] However, the only

[3] It may be noted that no demand for jury trial was served under Rule 38 (b) or filed under Rule 5 (d) of the Federal Rules of Civil Procedure. Any right thereto that petitioner might possibly have had was, therefore, waived. See Rule 38 (d). *Garland* v. *Garland*, 165 F. 2d 131 (C. A. 10); *McNabb* v. *Kansas City Life Ins. Co.*, 139 F. 2d 591 (C. A. 8); *May* v. *Melvin*, 141 F. 2d 22 (C. A. D. C.); *Gulbenkian* v. *Gulbenkian*, 147 F. 2d 173 (C. A. 2).

[4] It is the Government's position that both of these questions should be answered in the negative in a case seeking liquidated damages under Section 2. Though this Court's decisions seem to make it clear that a statute of limitations does not apply to the Government unless the intention to make it apply is express or "clearly manifested" (*United States* v. *Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120, 125, and

question which the Court of Appeals found it necessary to decide was whether the action "at the time commenced" was "barred by an applicable State statute of limitations," so as to deprive the Government of the 120 days' grace period provided in Section 6 (c) for accrued causes of action. Even were there doubt of the correctness of the decision below, this question does not appear of sufficient importance to warrant review by this Court inasmuch as Section 6 (c) is limited to causes of action which accrued prior to the enactment of the Portal Act and only a very few

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cases there cited; cf. also *United States* v. *Wittek*, No. 473, Oct. Term 1948, decided June 13, 1949), the district court in this case concluded that Section 6 of the Portal Act did apply to actions brought by the Government under Section 2 of the Walsh-Healey Public Contracts Act, but that such an action did not accrue until the Administrator's determination of liability. The consistent administrative interpretation and practice has been that a cause of action under Section 2 does not arise until final administrative determination of liability has been made under Section 5, since the courts cannot give the effect to administrative findings as directed by Section 5 until those findings are made. Consequently, actions have never been brought under Section 2 until administrative proceedings under Section 5 have been completed. This Court has frequently held that statutes of limitations do not begin to run until the cause of action has matured to the point where suit may be instituted upon it. *Woods* v. *Stone*, 333 U. S. 472, 481; *United States* v. *Wurts*, 303 U. S. 414; *Rawlings* v. *Ray*, 312 U. S. 96; *Fisher* v. *Whiton*, 317 U. S. 217; *Cope* v. *Anderson*, 331 U. S. 461. Accordingly, the district court decided in this case that as the cause of action did not accrue until the final administrative determination, none of the periods of limitation urged by petitioner had run when the complaint was filed in the district court less than 3 months later (R. 12–13).

of such cases are still pending. In any event, the decision of the court of appeals on this point is clearly correct. It is settled beyond question by the decisions of this Court "that the United States is not bound by state statutes of limitations." *United States* v. *Summerlin,* 310 U. S. 414, 416; *United States* v. *Thompson,* 98 U. S. 486; *United States* v. *Nashville, C. & St. L. Ry Co.,* 118 U. S. 120; *Stanley* v. *Schwalby,* 147 U. S. 508, 514, 515; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 132; *Board of Commissioners* v. *United States,* 308 U. S. 343, 351. Petitioner does not deny that the state statute was inapplicable prior to the enactment of the Portal Act, but argues that the Portal Act made the state statutes immediately applicable so as to cut off even the grace period. But nothing in Section 6 purports to make state statutes applicable which did not theretofore apply; it obviously refers to state statutes of limitations applicable at the time of the enactment of the Portal Act. It seems equally obvious that the sole purpose of the exception from the grace period provided in Section 6 (c) was to make it clear that actions already barred were not to be revived.[5] The construction which

[5] This is made clear by the statement of Representative Gwynne reporting on the conference report of the bill subsequently enacted as the Portal Act (93 Cong. Rec. 4388): "Any cause of action that has accrued prior to the effective date of this act may be brought within 120 days after the act becomes effective, subject, however, to the provision that any cause of action barred by any State statute, whatever the length of it may be, *is not revived.* That action remains barred." [Italics supplied.]

petitioner urges not only distorts the clear language of the statute, but is contrary to the settled principle that statutes of limitations are to be strictly construed in the Government's favor. *United States* v. *Whited & Wheless,* 246 U. S. 552, 561; *Independent Coal Co.* v. *United States,* 274 U. S. 640, 650; *duPont de Nemours & Co.* v. *Davis,* 264 U. S. 456, 462; *United States* v. *United Mine Workers,* 330 U. S. 258.

CONCLUSION

In our view, the holding of the Court of Appeals was wholly correct, and no question warranting review is presented. If, however, the Court considers that this case presents the broader questions of the applicability of Section 6 of the Portal Act to Government actions, the Government would not be opposed to the granting of certiorari on these broader issues.

Respectfully submitted.

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JULY 1949.

APPENDIX

Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036; 41 U. S. C. 35–45):

* * * * *

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; * * * Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. * * *

* * * * *

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act * * * and to prescribe rules and regulations with respect thereto. * * * The Secretary of Labor

or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings * * * and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secreary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

* * * * *

Portal-to-Portal Act of 1947 (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C. 251–261):

* * * * *

SEC. 6. Statute of Limitations.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages,

unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healy Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

(b) if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations.

* * * * *

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